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BP PLC

v.

MOHD SHARIFF ABDULLAH

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HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[CIVIL SUIT NO: D5(IP)-22-1685-2008]
9 JANUARY 2009

C ***CIVIL PROCEDURE:*** *Pleadings - Striking out writ of summons and statement of claim - Application for - Passing off and trade mark infringement - Allegation of - Whether plaintiff pleaded necessary material facts for a cause of action - Whether writ of summons and statement of claim disclosed reasonable cause of action - Whether defendant showed* D *concrete or justifiable grounds for striking out plaintiff's cause of action - Rules of the High Court 1980, O. 18 r. 19(1)(a)*

This was the defendant's application to strike out the plaintiff's writ of summons and statement of claim pursuant to O. 18 E r. 19(1)(a) of the Rules of the High Court 1980 on the ground that the said writ of summons and statement of claim did not disclose any reasonable cause of action. The plaintiff's claim against the defendant was based on passing off and trade mark infringement. The defendant challenged the plaintiff's pleaded F causes of action and alleged that the plaintiff had failed to plead essential elements of the said causes of action. The plaintiff's causes of action (as pleaded) may be summarized as follows: (i) the plaintiff had acquired substantial goodwill and reputation worldwide and in Malaysia in respect of the BP Products and G Services as identified by the trade marks 'BP' and the BP Helios Logo; (ii) the said trade mark and logo are distinctive of the plaintiff in Malaysia; (iii) the Association is registered by the name 'BP Petrol Dealers Association of Malaysia' and used the said name as well as the name 'The BP Petroleum Dealers Association H of Malaysia; (iv) by reason of the use by the Association of a name incorporation the plaintiff's trade mark 'BP' and by reason of the use of the plaintiff's BP Helios Logo, post divestment, the Association had falsely represented to the trade and public that the association are authorised dealers of or somehow associated or I connected with BP as a result of which the plaintiff had suffered damage or would suffer damage including irreparable loss and

damage to its goodwill and reputation; (v) the plaintiff was the registered proprietor of the trade mark 'BP' in Class 16 and the registered proprietor of the BP Helios Logo in Class 35; (vi) the Association had infringed the Class 16 Registration by using the trade mark 'BP' in the course of trade and had infringed the Class 35 Registration by using the BP Helios Logo in the course of trade in relation to business information. The issue that arose was whether on the face of the statement of claim, a reasonable cause of action was disclosed.

Held (dismissing defendant's application):

(1) The plaintiff had pleaded all the necessary material facts for a cause of action for passing off in its statement of claim (a) the facts leading to the conclusion that the plaintiff was entitled to goodwill in the letters 'BP' and the BP Helios Logo; (b) the acts of the defendant leading to the conclusion that it was making a representation leading to confusion or deception. The plaintiff's statement of claim alleged the unauthorized use by the Association of the plaintiff's world famous trade mark 'BP' and the BP Helios Logo clearly disclosed a reasonable cause of action for passing off and raised a question fit to be decided by a judge. The plaintiff's statement of claim was not hopeless or plainly unsustainable. The defendant's application to strike out the plaintiff's cause of action for passing off was clearly premised on erroneous or flawed principles of law and pleading. The allegation of the defendant that the plaintiff had failed to provide particulars of the defendant's false representation was misconceived. In these circumstances, the plaintiff ought not to be deprived of its right to have its case tried by a proper trial. The plaintiff was not required to plead particulars of damage, as long as the plaintiff pleaded the material fact that it had and would suffer damage, which fact it ought to be given an opportunity to establish at trial. The plaintiff's statement of claim pleaded all the material facts which may lead to the conclusion of passing off. The plaintiff's statement of claim disclosed a reasonable cause of action for passing off. (paras 16, 20, 21, 24, 26 & 28)

(2) The plaintiff had pleaded all the material facts to sustain a cause of action for trade mark infringement namely (i) title to the registered trade marks in question; (ii) the infringing acts of the defendant *ie*, that the defendant had used a Logo incorporating the letters 'BP' and the BP Helios Logo in the

course of trade and services; (iii) that the plaintiff would likely suffer damage as a result of the Association's infringement. The plaintiff's statement of claim which pleaded the above material facts clearly disclosed a reasonable cause of action for trade mark infringement and raised a question fit to be decided by a judge. The plaintiff's statement of claim was not hopeless or plainly unsustainable. In these circumstances, the plaintiff ought not to be deprived of its right to have its case tried by a proper trial. The defendant had not shown any concrete or justifiable grounds for striking out the plaintiff's cause of action for trade mark infringement. (paras 31, 33, 34, 35, 36 & 37)

(3) The defendant's application was unfounded in law and ought to be dismissed with costs. Given that all of the plaintiff's causes of action pleaded in the statement of claim were founded on the same facts, this court ought to allow the entire claim to be tried and heard with all evidence and full arguments on the law being made available to the court. (para 44)

Case(s) referred to:

Bandar Builders Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

British Legion v. British Legion Club (Street) Ltd [1931] 48 RPC 555 ***(refd)***

Fletcher Challenge Ltd v. Fletcher Challenge Pty Ltd [1981] 1 NSWLR 196 ***(refd)***

Glaxo plc v. Glaxowellcome Ltd [1996] FSR 388 ***(refd)***

HSBC Malaysia Bhd v. Dominance Timber Industries Holdings Sdn Bhd & Others [2003] MLJU 307 ***(refd)***

Law Society of England and Wales v. Society of Lawyers & Ors [1996] FSR 739 ***(refd)***

Lego System Aktieselskab & Anor v. Lego M Lemelstrich Ltd [1983] FSR 155 ***(refd)***

Maxis Sdn Bhd v. Suruhanjaya Syarikat Malaysia & Ors [2003] 4 CLJ 774 HC ***(refd)***

Mooney & Ors v. Peat, Marwick, Michell & Company & Anor [1966] 1 LNS 109 ***(refd)***

Seet Chuan Seng & Anor v. Tee Yih Jia Food Manufacturing Pte Ltd [1994] 3 CLJ 7 SC ***(refd)***

The British Diabetic Association v. The Diabetic Society & Ors [1996] FSR 1 ***(refd)***

Tumasek Beckmann Cutlery Sdn Bhd v. Bromma (Malaysia) Sdn Bhd [2008] 1 LNS 280 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)(a), (2)
Trade Marks Act 1976, s. 38

Other source(s) referred to:
Atkin's Court Forms Malaysia in Civil Proceedings, vol 8, pp 6213, 7094
Bullen & Leake & Jacob's Precedents of Pleadings, 15th edn, vol 2, pp 1043, 1058, 1059

For the plaintiff - Dato' Ambiga Sreenevasan (Janini Rajeswaran with her); M/s Sreenevasan
For the defendant - Puspawati Rosman; M/s Onn & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali J:

[1] Enclosure 6 is the defendant's application to strike out the plaintiff's writ of summons and statement of claim pursuant to O.18 r. 19(1)(a) of the Rules of the High Court (RHC)1980, on the ground that the said writ of summons and statement of claim do not disclose any reasonable cause of action.

[2] The plaintiff's claim against the defendant is based on passing off, copyright infringement and trade mark infringement.

[3] The defendant's application (encl. 6) is based solely on O. 18 r. 19(1)(a) of RHC 1980 and therefore the principles of law applicable are that only the statement of claim (and not extrinsic evidence/documents) is to be considered by this court, and all statements therein are deemed true.

[4] The defendant has challenged the plaintiff's pleaded causes of action for passing off and trade mark infringement. The defendant's alleged grounds are essentially that the plaintiff has failed to plead essential elements of the said causes of action.

[5] The defendant has not challenged the plaintiff's pleaded cause of action for copyright infringement. Therefore, the defendant's application, which seeks the striking out of the entire statement of claim, is ineffectual and/or unjustified as regard to copyright infringement.

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The Law

[6] The defendant's application is based only on O. 18 r. 19(1)(a) of the RHC 1980 ie, on the allegation that the plaintiff's statement of claim does not disclose a reasonable cause
B of action. The principles of law applicable are that in this type of application, only the statement of claim (not extrinsic evidence or documents) is to be considered. This is pursuant to O. 18 r. 19(2) which expressly says that no evidence shall be admissible on an application under para (1)(a) of the said rule. For that purpose,
C all the statements in the statement of claim are deemed true. No evidence either in the form of affidavits or statement from the Bar are to admissible. What the court has to do is just to look on the face of the statement of claim. So long as the statement of claim discloses some grounds of action, the mere fact that the plaintiff
D is not likely to succeed on it at the trial is not a ground for it to be struck out.

[7] In *Mooney & Ors v. Peat, Marwick, Michell & Company & Anor* [1966] 1 LNS 109, Raja Azlan Shah J in dealing with an
E application to strike out the statement of claim for disclosing no reasonable cause of action held as follows:

> It is firmly established that the power exercisable under r. 4 "is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is
F insufficient, even if proved, to entitle the plaintiff to the relief of which he asks for": see the judgment of Lindley MR in *Hubbuck & Sons v. Wilkinson, Heywood & Clark Ltd.* Where the situation arises, the pleadings and particulars alone shall be considered and all the allegations in it shall be presumed to be true and it is only on that assumption that any statable case can be made for this
G application: see *Peck v. Russell*. The Court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the statement of claim discloses some ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for
H it to be struck out. A recent exposition of the law is afforded by the judgment of Danckwerts LJ in *Wenlock v. Moloney*:
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> > Under the rule (i.e. Order 25 r. 4) it had to appear on the face of the plaintiff's pleading that the action could not succeed or was objectionable for some other reason. No
> I evidence could be filed … But as the procedure was of a summary nature the party was not to be deprived of his right to have his case tried by a proper trial unless the matter was clear.

[8] In *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 at p. 11, the Supreme Court held as follows: A

> The principles upon which the Court acts in exercising its powers under any of the four limbs of O. 18 r. 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley M. R in *Hubbuck v. Wilkinso*n [1899] 1 QB 86 p 91) and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable … B C
>
> It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence …
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> So long as the pleadings disclose some course of action or raise some question fit to be decided by the Judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out. D

[9] The statement of claim must be hopeless, baseless or without foundation in law or equity or otherwise an abuse of the process of the court before it can be struck out. (See: *Tumasek Beckmann Cutlery Sdn Bhd v. Bromma (Malaysia) Sdn Bhd* [2008] 1 LNS 280). E

[10] The relevant principles of law to be applied in an application under on O. 18 r. 19(1)(a) of RHC, 1980 may thus be summarised as follows: F

(a) The court must only consider whether on the face of the impugned pleading (ie, the plaintiff's statement of claim), a reasonable cause of action is disclosed; G

(b) In respect of what is a "reasonable cause of action", so long as the statement of claim discloses some cause of action or raises some question fit to be decided by a judge, the mere fact that the case is weak or not likely to succeed is not a ground for striking it out; H

(c) In considering the said impugned pleading, the court is to assume that all the facts pleaded in the statement of claim are true. As a consequence, the defendant cannot base its grounds for striking out on the allegation that the facts in the statement of claim are untrue; I

A (d) The defendant cannot refer to external circumstances or allegations to contest the plaintiff's pleaded cause of action; and

(e) A pleading should only be struck out if on the face of it, it is
B hopeless or plainly unsustainable.

[11] Furthermore it must be borne in mind that a plaintiff need only plead material facts not evidence in the statement of claim. It is enough to set out the principal facts without needing to also set out the subordinate facts which are the means of proving it.
C (See: *HSBC Malaysia Berhad v. Dominance Timber Industries Holdings Sdn Bhd & Others* [2003] MLJU 307 at p. 9; *Tumasek Beckmann Cutlery Sdn Bhd v. Bromma (Malaysia) Sdn Bhd (Supra)*.

Plaintiff's Causes Of Action – As Pleaded

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[12] The plaintiff's causes of action (as pleaded) may be summarised as follows:

Passing Off:

E (a) The plaintiff has acquired substantial goodwill and reputation worldwide and in Malaysia in respect of the BP Products and Services as identified by the trade marks 'BP' and the BP Helios Logo. The said trade mark and logo are distinctive of the plaintiff in Malaysia (para 17 of the statement of claim);

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(b) The Association is registered by the name 'BP Petrol Dealers Association of Malaysia' and uses the said name as well as the name 'The BP Petroleum Dealers Association of Malaysia'. The Association also uses the BP Helios Logo on letterheads
G and business cards (para 21 of the statement of claim);

(c) The objects of the Association include to 'promote the commercial interest of its members' (para 19.3 of the statement of claim);

H (d) The Association comprises of members who used to operate BP Petrol Kiosk but now operate BHP petrol kiosks (paras 2.4, 8, 19.2 of statement of claim);

(e) By reason of the use by the Association of a name
I incorporation the plaintiff's trade mark "BP" and by reason of the use of the plaintiff's BP Helios Logo, post divestment, the Association has falsely represented to the trade and public that:

(i) The Association and/or its members are authorised dealers of or somehow associated or connected with BP;

(ii) The products and services of its members are that of BP's or somehow associated or connected with BP

as a result of which the plaintiff has suffered damage, will suffer damage and/or is likely to suffer damage including irreparable loss and damage to its goodwill and reputation (paras 27 to 29 of the statement of claim).

Copyright Infringement

(a) Copyright subsists in the BP Helios Logo and the plaintiff is the owner of the same in Malaysia (para 18 of the statement of claim);

(b) The Association uses a Logo which is identical to the plaintiff's BP Helios Logo in respect of its letterhead and business cards (paras 20 and 21.2 of the statement of claim);

(c) By reason thereof the Association has infringed the copyright subsisting in the BP Helios Logo in Malaysia by reproducing or substantially reproducing the same by reason of which the plaintiff has suffered damage, will suffer damage and/or is likely to suffer damage including irreparable loss and damage to its goodwill and reputation (paras 30 to 31 of the statement of claim).

Trade Mark Infringement

(a) The plaintiff is the registered proprietor of the trade mark 'BP' in Class 16 including in respect of 'printed matter' (para 11 of the statement of claim);

(b) The plaintiff is also the registered proprietor of the BP Helios Logo in Class 35 for 'business information, business and commercial management consultancy and assistance services' (para 11 of the statement of claim);

(c) The Association has infringed the Class 16 Registration by using the trade mark 'BP' in the course of trade for *inter alia* 'printed matter' (para 32 of the statement of claim);

A (d) The Association has infringed the Class 35 Registration by using the BP Helios Logo in the course of trade in relation to 'business information, business and commercial management consultancy and assistance services' (para 33 of the statement of claim).

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[13] For the purposes of the defendant's application, all the facts above which have been pleaded are to be taken as true.

Cause Of Action For Passing Off

C **[14]** As stated earlier, the court shall only consider whether on the face of the statement of claim, a reasonable cause of action is disclosed. For that purpose, the plaintiff need only plead material facts, not evidence. It is sufficient for the plaintiff to set out the principal facts without needing to also set out the subordinate D facts which are means of proving it.

[15] The material facts that are required to be pleaded in a cause of action for passing off are clearly stated in *Bullen & Leake & Jacob's Precedents of Pleading* and these material facts are:

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(a) the facts that lead to the conclusion that the plaintiff has acquired goodwill in the country;

(b) the acts of the defendant that the plaintiff relies on to lead to the conclusion that he is making a misrepresentation leading to F confusion or deception;

(c) that there is damage or a likelihood of damage caused to the plaintiff. (See: *Bullen & Leake & Jacob's Precedents of Pleadings* (15th edn) vol 2 at pp 1058-1059; see also *Atkin's Court Forms Malaysia in Civil Proceedings* vol. 8 at p. 6213, XV [6761]). G

[16] The plaintiff has in fact pleaded all the necessary material facts for a cause of action for passing off in its statement of claim as illustrated below:

H (a) The facts leading to the conclusion that the plaintiff is entitled to goodwill in the letters "BP" and the BP Helios Logo are pleaded in paras 10 to 17 of the statement of claim;

(b) The acts of the defendant leading to the conclusion that it is I making a misrepresentation leading to confusion or deception are pleaded in the following paragraphs of the statement of claim:

(i) the defendant's acts are pleaded in paras 19 to 22 of the statement of claim; A

(ii) that such acts are a misrepresentation, are misleading and are a deception, are pleaded in paras 27 and 28 of the statement of claim; B

(c) The fact that there is damage or a likelihood of damage is pleaded in para 29 of the statement of claim.

[17] The defendant erroneously alleges that the case of *Seet Chuan Seng & Anor v. Tee Yih Jia Food Manufacturing Pte Ltd* [1994] 3 CLJ 7 sets out the elements that must be pleaded in a cause of action for passing off. C

[18] In actual fact, the said case only sets out the characteristics that should be present to create a cause of action for passing off ie, the characteristics that should be established at trial in order for the plaintiff to succeed in a cause of action for pasing off. The said case of *Seet Chuat Seng* does not state that each of those very five characteristics must be expressly pleaded. D

[19] As long as the material facts, that may lead to the conclusion that the five characteristics have been established, are pleaded, this is sufficient. In the present case, the material facts that may lead to the five characteristics being established have in fact been pleaded. E F

[20] The plaintiff's statement of claim which alleges the unauthorised use by the Association of the plaintiff's world famous trade mark "BP" and the BP Helios Logo clearly discloses a reasonable cause of action for passing off and raises a question fit to be decided by a judge. The plaintiff's statement of claim is not hopeless or plainly unsustainable. G

[21] The defendant's application to strike out the plaintiff's cause of action for passing off is clearly premised on erroneous or flawed principles of law and pleading. H

[22] The allegation of the defendant that the plaintiff has failed to provide particulars of the defendant's false representation is misconceived. Such particulars have been provided on p 17 of the statement of claim (paras 27 and 28 of the statement of claim). The particulars so provided are consonant with the various I

A authorities texts on pleadings and precedents stated above. In any event, the plaintiff has reserved the right in its pleadings to provide and rely on further acts of misrepresentation upon discovery, which it is also entitled to do. A*tkin's Court Forms Malaysia in Civil Proceedings* illustrates that this is acceptable and
B common practice. (See: *Atkin's Court Forms Malaysia in Civil Proceedings* vol. 8 at p. 7094, XV [7105].

[23] The plaintiff's statement of claim clearly pleads the following:

C (a) The defendant is an Association made up of members who operated BP petrol stations (paras 2.4 and 19.2 of the statement of claim) and who now operate BHP petrol stations (para 8 and 21 of the statement of claim). Such members would therefore at all material times have been and are
D engaged in a trade or business of petroleum and oils.

(b) One of the stated objectives of the defendant is to "promote the commercial interests of its members" (paras 2.5 and 19.3 of the statement of claim). The defendant would therefore also be engaged in or associated with the trade and business of its
E members.

(c) The false representation by the defendant by reason of the use of 'BP' in its name and the BP Helios Logo is that either the defendant (as an Association) or its members are
F authorised dealers of or somehow associated or connected with the plaintiff or that the defendant's or its members' goods and services are that of BP's or somehow associated or connected with BP (paras 27 and 28 of the statement of claim).

G **[24]** Clearly based on the above facts which are pleaded, it cannot be concluded that the plaintiff's statement of claim and its cause of action based on passing off is "hopeless, baseless or without foundation in law or equity". In these circumstances, the
H plaintiff ought not to be deprived of its right to have its case tried by a proper trial.

[25] Further it is worth taking note of the fact that plaintiffs in other cases have in the past succeeded in passing off actions even where the defendant was essentially not involved in trade or
I business in the traditional sense or in any trade or business at all. (See: *British Legion v British Legion Club (Street) Ltd* [1931] 48

RPC 555 where the defendant was a non political social club; *Law Society of England and Wales v. Society of Lawyers & Ors* [1996] FSR 739 where the defendants were *inter alia* The Society of Lawyers. The Society of Lawyers provided regulation and accredition to its members and promoted its members; *The British Diabetic Association v. The Diabetic Society & Ors* [1996] FSR 1 where the defendant was The Diabetic Society, which was a charity which provided assistance to diabetics; *The Guide Dog Owners and Friends Association Inc v. Guide Dog Association of New South Wales and Anor* [1998] at p. 14 where the defendant was a charitable body which trained guide dogs; and *Glaxo plc v. Glaxowellcome Ltd* [1996] FSR 388 where the defendant was a company which had not traded at all.

[26] The defendant contends that the plaintiff must provide in the statement of claim particulars of damage in a cause of action for passing off. However, the court cannot agree with the defendant on this issue. The plaintiff is not required to plead particulars of damage, as long as the plaintiff pleads the material fact that it has and will suffer damage, which fact it ought to be given an opportunity to establish at trial.

[27] The learned author in *Bullen & Leake & Jacob's Precedents of Pleadings* (15th edn. vol. 2, p 1059) states as follows:

> The normal practice in a passing off action is to claim an inquiry as to damages … accordingly it is not necessary to plead or prove matters going to quantum of damage – though of course damage or the likelihood of damage must be pleaded and proved.

[28] In light of the matters stated above, the court finds that the defendant's grounds for alleging that the plaintiff does not have a reasonable cause of action in passing off is premised on erroneous suppositions of law and misconstructions of the plaintiff's pleaded case. The court is satisfied that the plaintiff's statement of claim pleads all the material facts which may lead to the conclusion of passing off and that the plaintiff's statement of claim does disclose a reasonable cause of action for passing off.

Cause Of Action For Trade Mark Infringement

[29] The elements to be established for trade mark infringement are set out in s. 38 of the Trade Marks Act 1976 which reads as follows:

A (1) A registered trade mark is infringed by a person who, not being the registered proprietor of the trade mark or registered user of the trade mark using by way of permitted use, uses a mark which is identical with it or so nearly resembling it as is likely to deceive or cause confusion in the course of trade in relation to goods or services in respect of which the trade mark is registered in such a manner as to render the use of the mark likely to be taken either:

(a) as being use as a trade mark;

(b) in a case in which the use is use upon the goods or in physical relation thereto or in an advertising circular, or other advertisement, issued to the public, as importing a reference to a person having the right either as registered proprietor or as registered user to use the trade mark or to goods with which the person is connected in the course of trade; or

(c) in a case in which the use is use at or near the place where the services are available or performed or in an advertising circular or other advertisement issued to the public, as importing a reference to a person having a right either as registered proprietor or as registered user to use the trade mark or to services with the provision of which the person is connected in the course of trade.

[30] The material facts that need to be pleaded in a cause of action for trade mark infringement are:

(a) the plaintiff's title to the registered trade mark;

(b) that the defendant has done or is doing acts which amount to infringement;

(c) where the registered mark and the offending mark are colourably similar, the actual instances of confusion or the likelihood of confusion;

(d) that there is damage or a likelihood of damage caused to the plaintiff.

(See: *Bullen & Leake & Jacob's Precedents of Pleadings* (15th edn) vol. 2 at p 1043).

[31] Here the plaintiff has pleaded all the material facts to sustain a cause of action for trade mark infringement namely:

(a) title to the registered trade marks in question (para 11 of the statement of claim); A

(b) the infringing acts of the defendant namely that the defendant has used a Logo incorporating the letters "BP" and the BP Helios Logo in the course of trade in respect of registered goods in Class 16 and services in Class 35 respectively (paras 32 and 33 of the statement of claim); B

(c) that the plaintiff has will and/or is likely to suffer damage as a result of the Association's infringement (para 34 of the statement of claim). C

[32] The plaintiff in these circumstances need not plead the particulars of "deceit or confusion" which is only relevant where the offending mark is similar (not identical) to the registered mark. D

[33] The plaintiff's statement of claim which pleads the above material facts (which facts must for the purposes of this application be taken as true) clearly discloses a reasonable cause of action for trade mark infringement and raises a question fit to be decided by a judge. The plaintiff's statement of claim is not hopeless or plainly E unsustainable. In these circumstances, the plaintiff ought not to be deprived of its right to have its case tried by a proper trial. Whether or not the plaintiff succeeds is a separate issue.

[34] The plaintiff has pleaded all the material facts for trade mark F infringement at paras 32 and 33 of the statement of claim. The Logo used by the defendant incorporates the plaintiff's registered trade marks. It is not necessary for the plaintiff to provide particulars of how the defendant has caused confusion.

[35] The plaintiff has also pleaded in para 34 of the statement of G claim that it has, will and is likely to suffer loss and damage by reason of the infringement. In this regard, the plaintiff need not plead specific particulars of loss and damage. (See: *Bullen & Leake & Jacob's Precedents of Pleadings* (15th edn) vol. 2 at p. 1043).

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[36] Paragraphs 32 and 33 of the statement of claim clearly particularise the acts of infringement by the defendant that are within the plaintiff's knowledge, and sub-paragraphs 32.1(c) and 33.1(c) merely reserves the plaintiff's right to adduce evidence of further acts of infringement upon discovery. Such a plea is I consonant with the authoritative texts on pleadings and precedents. (See: *Atkin's Court Form Malaysia in Civil Proceedings* vol. 8 at p. 7094, XV [7105]).

[37] Given the circumstances set out above, the court finds that the defendant has not shown any concrete or justifiable grounds for striking out the plaintiff's cause of action for trade mark infringement.

[38] The defendant contends that the plaintiff has failed to show in the statement of claim that the defendant is involved in the provision of the same goods and services as the plaintiff.

[39] The court is of the view that it is not necessary that a plaintiff and defendant engage in the provision of identical goods or services in order for passing off to be established. It is true that the original legal concept of passing off is confined to traders competing in the same line of business or goods. But from a series of decided cases this cause of action has been extended to protect and preserve the goodwill of businessman from appropriation by another trader or businessman. It is not restricted to only cases where the parties are engaged in common field of business activity but also to any business that may mislead persons into thinking that those products or services were the goods and services of the plaintiff. (See: *Maxis Sdn. Bhd. v. Suruhanjaya Syarikat Malaysia & Ors* [2003] 4 CLJ 774; *Lego System Aktieselskab and Anor v. Lego M Lemelstrich Ltd* [1983] FSR 155; and *Fletcher Challenge Ltd v. Fletcher Challenge Pty Ltd* [1981] 1 NSWLR 196 at p. 204).

[40] In any event, plaintiffs in other cases have succeeded for passing off even against social clubs, charitable organisations and even companies that have never traded (See: para 25 above).

[41] Here the plaintiff has pleaded the objectives of the defendant, the activities of its members and the acts of the defendant which give rise to a misrepresentation. By reason of the same the court finds that there is a passing off as summarised above and this is an issue which ought to be determined at trial and not summarily dismissed.

[42] The plaintiff has pleaded in paras 32.1 and 33.1 of the statement of claim that the defendant has used the letters "BP" and the offending Logo in the course of trade in respect of the goods for which the plaintiff's trade marks are registered. The defendant has chosen to bring this application to strike out the plaintiff's statement of claim solely under O. 18 r. 19(1)(a) RHC,

under which all the facts pleaded in the statement of claim are deemed to be true. The question of whether or not the plaintiff can establish the said facts and prove trade mark infringement is a matter to be proved at trial.

[43] The defendant seeks to actively confuse the court by alleging that the letters "BP" and the BP Helios Logo are no longer used by the plaintiff, when in fact, the plaintiff has clearly pleaded in para 16 of the statement of claim that the said mark and logo continue to be used by the plaintiff in Malaysia in respect of BP's Current Malaysian Products and Services.

Conclusion

[44] In the circumstances set out above, the court finds that the defendant's application is unfounded in law and ought to be dismissed with costs. Further, the court also finds that given that the defendant has not challenged the veracity of the plaintiff's pleaded cause of action for copyright infringement and given that all three of the plaintiff's causes of action pleaded in the statement of claim are founded on the same facts, this court ought to allow the entire claim to be tried and heard with all evidence and full arguments on the law being made available to the court. Thus the defendant's application *vide* encl. 6, is hereby dismissed with costs.